FILED
MAY 7 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

App. No. 08-537

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

SUNRISE VALLEY, LLC; WESTERN ROCK PRODUCT, a dba of STAKER AND PARSON COMPANIES, a Utah corporation,
Petitioners,

v.

KEN SALAZAR, in his capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; UNITED STATES OF AMERICA,
Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Supreme Court of the United States has a "longstanding refusal to issue advisory opinions," Hayburn's Case, 2 U.S. 408 (1792); Alabama v. Shelton, 535 U.S. 654 (2002). Rather, the Court has a strict rule that it will decide only the matter before it. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000). This aversion to advisory opinions is not just an interpretation of the cold record of the Constitution or a political nicety, but is a very practical recognition of the nature of the judicial branch of government. "The meaning of a statute can only be determined on a case by case basis and will, in each case, turn differently on the clarity of the statutory language, its context, and the intent of its drafters." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499, 2517 n.1 (2007). This Court has consistently rejected arguments such as those made by the government that a reasoned judicial approach to decision making cannot be employed because it would result in a flood of litigation. Cleavinger v. Saxner, 474 U.S. 193 (1985). Especially where the integrity of the relationship between the government and its citizens is concerned this Court must not give in to rubber stamp adjudication. Id.

The Government would have this Court interpret Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), as if it were an advisory opinion on all land grants earned under The Stock-Raising Homestead

Act of 1916 ("SRHA") without regard to the time period of the homestead, the area of the country being homesteaded, the physical characteristics of the ground or the legal expectations of the homesteaders based upon existing norms about what is or is not conveyed by the language used.

This shallow shortcut to good legal analysis leads the Government to the second fallacious conclusion, i.e., that expectation interests developed since the 1983 Western Nuclear decision are more important than the fee simple real property ownership expectations arising in 1916 when Petitioners' predecessors in title homesteaded this ground. This argument is particularly troublesome in this case where it is undisputed that there are no expectation interests that have arisen in reliance on the Western Nuclear decision.

In short, the Government would have this Court deny this Petition for Certiorari without any legal analysis of the facts on the ground, when the facts on the ground are materially different from the facts that led to the Western Nuclear decision. The lower courts and the Government argue that to decide in favor of the Petitioners in this case would be to overrule Western Nuclear, but that certainly would not be necessary. If the Court were simply to apply the legal analysis it applied in Western Nuclear to the facts of this case, it would necessarily find in favor of the Petitioners. If the courts were to be afraid to undertake that analysis, the courts cease to be a judiciary and become little more than a paper shuffling bureaucracy. If for no other reason than to

reassert its right to decide controversies brought before it and the ability to exercise the venerated right of the courts to distinguish cases based on differences in the material facts before it, this Court should grant this petition and issue its writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned. Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979). Respondents argue that the reliance interests that have arisen in the wake of Western Nuclear would be undone should the Court accept Petitioner's arguments about the application of Western Nuclear to the specific facts of the present matter. Respondents argue that the reliance that should be considered by this Court is the reliance since the Western Nuclear decision in 1983. Such a position totally ignores the reliance interests of the homesteaders who originally obtained patents to land and have relied on their understanding since that time that gravel was not a mineral retained by the government under those patents.

In construing a congressional act, the relevant intent of Congress is that existing at the time the statute was enacted. See Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 611, and n.8 (1978); Winona & St. Peter R. Co. v. Barney, 113 U.S. 618, 625 (1885)("... they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the

language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.") When the SRHA was enacted, in 1916, the Department of the Interior's rule for what it considered to be a mineral deposit as those terms are used under the general mining laws was clear: "[W]hatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws." Western Nuclear, 462 U.S. at 62-63 (Powell, J., dissenting) citing Pacific Coast Marble Co. v. Northern Pacific R. Co., 25 Pub. Lands Dec. 233, 244-245 (1897).

The case of Zimmerman v. Brunson, 39 Pub.Lands Dec. 310 (1910), a case decided six years before the SRHA was passed, clearly indicates the Department of the Interior's views on gravel under the mining laws in place at that time. After quoting the rule cited above from Pacific Coast Marble, the Secretary of the Interior stated that:

> A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is

> the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

39 Pub.Lands Dec. at 312. The Department of the Interior had clearly established that gravel was not a mineral under the general mining laws at this time. As a result, those persons homesteading the land reasonably relied on an understanding that gravel was not a mineral reserved under the SRHA. The undisputed facts of this case confirm this understanding of the people in Southern Utah who homesteaded this ground. Pet. App. 59a- 67a.

To place the reliance interests of those who may have relied on Western Nuclear since 1983 ahead of the reliance interests of those persons who originally homesteaded lands under the SRHA back in the early 1900's and those subsequent owners of these lands would be wrong.

Public grants are "not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication." Leo Sheep Co. v. United States, 440

U.S. at 682-683 (quoting United States v. Denver & Rio Grande R. Co., 150 U.S. 1, 14 (1893)). By placing the reliance concerns of Western Nuclear ahead of those of the countless individuals and entities who have relied on the clear interpretation of land grants at the time these lands were homesteaded, the Government turns real property concepts on its head—particularly in a case such as this where there are no parties claiming any reliance interests under Western Nuclear.

CONCLUSION

For the above stated reasons, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 6th day of May, 2009.

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